In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-718

FREDERICK KIRSHNIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On June 7, 1972, petitioner was held in civil contempt by the United States District Court for the District of Connecticut for refusing to supply handwriting exemplars to a duly constituted federal grand jury before which he had been subpoenaed. He was committed to federal custody for a period of 90 days, subject to an earlier release if he supplied the exemplars or if the grand jury was discharged. The court of appeals affirmed (Pet. App. 1a).

1. As part of its investigation into the robbery of the Constitution National Bank in West Hartford, Connecticut, the federal grand jury in the District of Connecticut sought to obtain handwriting samples

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from petitioner for comparison with the demand note used in the bank robbery. When petitioner refused to supply the exemplars, the government applied to the district court for an order compelling him to give the samples. At a hearing on the application, the stenographic minutes of the grand jury proceedings were read and the grand jury foreman stated that the grand jury requested that the handwriting exemplars be furnished (Tr. 2–7).[1] An F.B.I. agent testified at the hearing that there were several bases for considering petitioner a prime suspect in the bank robbery: photographs of the robber taken by the bank's surveillance camera, incriminating information about petitioner supplied by a confidential informant, and handwriting and handprinting samples previously furnished to the F.B.I. by petitioner voluntarily (Tr. 8–9).

The previous samples, consisting of letters of the alphabet and four or five copies of the words found in the demand note, were written on paper different from that used in the note and were found by the F.B.I. Laboratory to be inadequate for comparison purposes. Additional samples on paper identical to that used in the demand note were requested in order to make possible a conclusive comparison by the Laboratory (Tr. 9–10, 16–18). Petitioner opposed the government's application on Fourth Amendment and other grounds. The district court ordered petitioner to supply ten samples of the words in the demand

[1] "Tr." refers to the transcript of the June 7, 1972, hearing on the government's application.

note; when he refused to do so, the court held him in contempt (Tr. 11–15, 19–27).

2. Petitioner contends that the request for handwriting exemplars was outside the scope of the grand jury subpoena, which directed him "to appear * * * to testify before the Grand Jury," and was therefore invalid under Rule 45, F.R.Civ.P. (Pet. 4–6). Apart from the fact that the grand jury subpoenas are governed by Rule 17, Fed.R.Crim.P., not Rule 45 of the Civil Rules, the words "to testify" in the subpoena are not narrowly limited in meaning to the presentation of oral testimony within the Fifth Amendment's protection against compelling a person "in any criminal case to be a witness against himself * * *." Instead, these words encompass the giving of such personal evidentiary characteristics as voice samples, handwriting and fingerprints. The record shows explicitly that petitioner was aware before he entered the grand jury room that the purpose for subpoenaing him was to obtain samples of his handwriting (Tr. 4); thus petitioner's failure to comply was not based on any misunderstanding about the meaning of the subpoena.

3. Petitioner further argues that the request was a search and seizure requiring a prior showing of reasonableness and of probable cause by the Government (Pet. 6–11). This Fourth Amendment argument, like that in *Schwartz* v. *United States*, pending on petition for a writ of certiorari (No. 71–6522), raises issues presently before the Court in *United States* v. *Dionisio*, No. 71–229, and *United States* v. *Mara*, No. 71–850, which were argued on November 6, 1972. Although the show-

ing actually made by the government here would unquestionably be sufficient to satisfy the Seventh Circuit's requirements in *Dionisio* and *Mara,* it may nevertheless be appropriate to defer disposition of the instant petition until after those cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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